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Genocide: Options

Q: What penalties are provided by international law for the crime of genocide? What can be done to those who commit genocide?

A: Allegations under the 1948 Genocide Convention can be pursued in several ways.

1. Domestic Criminal Prosecution. Article VI of the Convention provides that persons charged with an act of genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed." Each State Party is obliged to enact the necessary legislation to give effect to the Convention and to provide "effective penalties for persons guilty of genocide" (as well as conspiracy to commit genocide, direct and public incitement to genocide, attempt to commit and conspiracy in genocide) within its territory. Under this Article the country in which genocide takes place is obliged to bring a domestic prosecution under the Convention. Other States Party do not have an obligation to prosecute (they do, however, have the duty to extradite alleged offenders) and will likely not have the necessary jurisdiction. The U.S. implementing legislation provides jurisdiction only over defendants who are U.S. nationals or who committed genocidal acts on U.S. territory.

2. International Criminal Court. Article VI also provides that persons accused of genocide may be tried "by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." Although there is a long history of consideration of such a court, none has been established. The effort would be difficult and contentious, requiring agreement on a range of practical issues (such as jurisdiction, rules of procedure and evidence, funding, selecting prosecutors, determining appropriate forms of punishment, etc.). Risk of politicization could be substantial. These and other concerns led the Senate to include a declaration in its resolution of advice and consent to ratification of the Convention to the effect that the U.S. reserves its right to effect participation in such a tribunal "only by a treaty entered into specifically for that purpose with the advice and consent of the Senate."

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3. Referral to UN. Article VIII permits States Party to "call upon the competent organs of the United Nations to take such action under the Charter...as they consider appropriate for the prevention and suppression of acts of genocide" including conspiracy, incitement, attempt and complicity. The issue can be presented to the Security Council under Chapter VI or VII, to the General Assembly, or to the UN Commission on Human Rights (for example, for investigation as a "consistent pattern of gross violations of internationally recognized human rights"). A range of actions can be sought to prevent and suppress the alleged acts, but the various UN organs would not be competent to conduct criminal prosecutions themselves.

4. ICJ Proceeding. Article IX of the Convention provides for submission to the International Court of Justice "disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those related to the responsibility of a State for genocide or for any of the other acts enumerated in Article III" (e.g., conspiracy, incitement attempt, complicity). Such a proceeding could only be brought against a State Party, not against individual defendants (although the Court might be led to consider the responsibility or even culpability of individual government officials). The United States, however, subjected its ratification of the Convention to a reservation under which the U.S. may only be sued in the ICJ with its consent; since, as a matter of international law, that reservation may be invoked reciprocally against the U.S., the U.S. could initiate such an action only with the specific consent of the challenged foreign government.

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